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STATE OF WASHINGTON

BY  DEPUTY

No. 43847-0-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION TWO

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IN THE MATTER OF THE PERSONAL RESTRAINT OF

RYAN FARRIS,

Petitioner.

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REPLY BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

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**A.     INTRODUCTION**

On December 13, 2012, the Clark County Prosecuting Attorney filed a Response to Personal Restraint Petition (“*Response*”). This Brief is submitted by way of reply to some of the arguments contained within the State’s *Response*.

**B.     DISCUSSION**

**1.     Legal Standards**

The familiar *Strickland* formulation governs this Court’s ineffectiveness inquiry. Review of counsel’s actions is hallmarked by a measure of deference. See *State v. McFarland*, 127 Wn.2d 322, 324-25 (1995); *Strickland v. Washington*, 466 U.S. 689 (1984). However, deference to the decisions of counsel is not limitless. See, e.g., *Martinez v. Ryan*, --- U.S. ---, 132 S.Ct. 1309 (2012) (remanding for further proceedings); *In re Hubert*, 138 Wn.App. 924, 928 (2007) (trial counsel’s failure to request a necessary jury instruction demonstrated both deficient performance and prejudice).

Demonstrating deficient performance requires showing that “‘counsel’s representation fell below an objective standard of reasonableness.’” *Strickland*, 466 U.S. at 688. The reviewing court is not at liberty to rely on hindsight to reconstruct the circumstances of counsel’s conduct, “indulg[ing] ‘*post hoc* rationalization’ for counsel’s decisionmaking

that contradicts the available evidence of counsel's actions.” *Harrington v. Richter*, --- U.S. ---, 131 S.Ct. 770, 790 (2011) (quoting *Wiggins v. Smith*, 539 U.S. 510, 526 (2003)). The critical question is “whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms.’” *Id.* at 690. Attorneys have a duty to investigate their client’s case so as to enable them to make professional decisions that merit distinction as “informed legal choices.” See *Elmore v. Ozmint*, 661 F.3d 783, 858 (4<sup>th</sup> Cir. 2011). Genuinely evaluating tactical options is a necessity, and “[c]ounsel’s lack of preparation and research cannot be considered the result of deliberate, informed trial strategy.” *Hyman v. Aiken*, 824 F.2d 1405, 1416 (4<sup>th</sup> Cir. 1987) ([t]he presumption that counsel’s choices were part of an overarching strategy “does not overcome the failure of . . . attorneys . . . to be familiar with readily available documents necessary to an understanding of their client’s case”).

The case law describes two lines of cases. In one line, the record may show counsel’s entire performance fell below the constitutional minimum. See, e.g., *Williams v. Taylor*, 529 U.S. 362 (2000) (finding counsel’s performance ineffective where he failed to present substantial mitigation evidence to sentencing jury). In the other, the record may indicate that counsel, for the most part, provided adequate performance, yet he or she committed a single, critical error that renders the

representation ineffective. See *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) (holding that counsel's "total failure to conduct pre-trial discovery" constituted ineffective assistance); see also *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[T]he right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial."); *Mason v. Hanks*, 97 F.3d 887, 902 (7<sup>th</sup> Cir.1996) (finding that failure to raise issue of inadmissible hearsay constituted deficient performance). This case fits in the former category. Counsel's entire performance was deficient.

Once a petitioner has established deficient performance, he must prove prejudice – "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" of prejudice exists "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome"; indeed, a "reasonable probability" need only be "a probability sufficient to undermine confidence in the outcome." *Detrich v. Ryan*, 677 F.3d 958, 1057 (9<sup>th</sup> Cir. 2012) (quoting *Strickland*, 466 U.S. at 694).

Simply put, the State is faced with overwhelming evidence that this Petitioner's trial attorney engaged in multiple acts of deficient conduct. Some of these acts and omissions independently meet the *Strickland* test for

prejudice; they very clearly meet the prejudice standard when considered cumulatively. The State's task in attempting to persuade this Court that Petitioner has not established ineffective counsel is very difficult precisely because the evidence establishing the claim is so overwhelming. But the mere fact that their task is extremely difficult does not provide an excuse for distorting the record and failing to rebut – or even mention, in many cases – the substantial evidence presented by Petitioner in his Opening Brief.

**2. The State has Failed to Rebut Any of Petitioner's Evidence**

The Washington Supreme Court set forth very clear guidelines for submissions in personal restraint cases in *In re Rice*, 118 Wn.2d 876 (1992). As in summary judgment proceedings in a civil case, the PRP petitioner is required to submit evidence to support his factual allegations.

The *Rice* Court explained:

The petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

118 Wn.2d at 886. Ryan Farris has satisfied that requirement in this case by submitting detailed affidavits from numerous witnesses and has

therefore met the threshold required by *Rice*. As such, Petitioner has raised a *prima facie* case of constitutional error. *See, e.g.*, RAP 16.7(a).

The *Rice* Court also set forth a clear directive to the State if it intends to controvert any of the Petitioner's factual claims.

Once the petitioner makes this threshold showing, the court will then examine the State's response to the petition. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. *In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence.* If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.

118 Wn.2d at 886-87 (emphasis supplied).

Here, the State has failed to meet these most-basic requirements in any respect. The State has not identified any material disputed questions of fact. Rather, the State relies upon broad and generalized claims regarding the supposed "reasonableness" of trial counsel's actions. None of these claims can be squared with the detailed and comprehensive declaration of Petitioner's trial counsel, Michael Green.

In his declaration, trial counsel concedes that he made several critical errors during his representation of Petitioner, including:

- Failing to recognize that he was entirely unqualified to handle a trial in which the defendant was charged with a Class A sex felony – his first of this kind – in that, among many other shortcomings, he had never

interviewed a victim in a sexual assault case, had never cross-examined the complaining witness in any sexual abuse case, and had never defended any case involving gynecological testimony (*Green Dec.* at ¶¶ 8, 27);

- Failing to retain or even consult with a medical expert who could review and potentially confront the medical doctor who was central to the State's case (*Green Dec.* at ¶¶ 27, 48-51);
- Failing to effectively cross-examine the State's medical expert (*Green Dec.* at ¶¶ 40-44);
- Failing to conduct basic legal research regarding the State's ability to amend the Information to modify the date of the charged offense, and thus relying on a legally untenable strategy to defend the case at trial (*Green Dec.* at ¶¶ 34-37);
- Failing to conduct background investigation and thus failing to discover that A.L. had a clear motive to accuse Petitioner of sexual assault, including reviewing or utilizing basic impeachment material that included a declaration, signed by the complaining witness under oath, in which she described misconduct at Petitioner's home during the timeframe of the alleged incident – including sexual misconduct by others – but failed to mention any sexual misconduct by Petitioner (*Green Dec.* at ¶ 53);
- Failing to competently cross-examine A.L. at trial (*Green Dec.* at ¶ 54);

Green candidly acknowledges that these decisions were not the product of strategy. Moreover, he recognizes that “there is a substantial likelihood that the trial would have turned out differently but for my errors and the limitations imposed by the Barton law firm.” *Green Dec.* at ¶ 58.

The State has failed to present anything – and certainly no “competent evidence” – that might meet the Petitioner’s evidence. The State has not provided an affidavit from any witness (or any participant in the trial).<sup>1</sup> Clearly, if the State had any information that could contradict the testimony of Petitioner’s witnesses, the State was duty bound to present that evidence to this Court. Given this failing, the Court must accept the Petitioner’s facts as true.

Nevertheless, the State invites this Court to conclude that trial counsel’s errors might have somehow been strategic in nature. *See Response* at 15, 34. The Court must not entertain these speculative arguments. *See, e.g., State v. Warren*, 55 Wn.App. 645, 654 (1989) (“Absent any evidence in the record to support this theory, however, we decline to speculate about defense counsel’s tactical intentions.”); *Alcala v. Woodford*, 334 F.3d 862, 869-73 (9<sup>th</sup> Cir. 2003) (counsel failed to present known testimony and documentary evidence that would have corroborated defendant’s alibi; court declines to “manufacture” a strategy for counsel); *Pavel v. Hollins*, 261 F.3d 210, 217-23 (2<sup>d</sup> Cir. 2001) (defense counsel’s decision not to call certain witnesses was

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<sup>1</sup> For example, the State has presented nothing to contradict the declaration of Dr. Phillip Welch. The State has presented nothing from its own expert, Dr. Vader. Nor has the State presented evidence from any other medical expert. Presumably, the State must concede that the facts contained within Dr. Welch’s declaration are accurate and reliable.

“strategic” because counsel hoped to prevail on a motion to dismiss, but was nevertheless unreasonable).

### **3. Trial Counsel Was Burdened by a Conflict of Interest**

Defendants who retain their own lawyers are entitled to no less protection under the Sixth Amendment than defendants for whom the state appoints counsel. *See Mickens v. Taylor*, 535 U.S. 162 (2002). While the mere fact that trial counsel was inexperienced at the time of trial is never sufficient, of itself, to constitute ineffective representation, his lack of experience may be considered in conjunction with other matters in reaching a conclusion that his representation was constitutionally deficient. *See State v. Jury*, 19 Wn.App. 256, 263 (1978). *See also* Comment, *Incompetency of Counsel*, 25 Baylor L.Rev. 299, 302 (1973); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289, 306–07 (1964).

The State wrongly claims that Petitioner “never explains why his trial counsel would have needed particularized trial experience in order to effectively represent him on this case.” *Response* at 15. To the contrary, Petitioner explained very clearly in his Opening Brief that trial counsel was entirely unqualified to handle a serious sexual assault case and that he had never before handled a case involving expert gynecological evidence.

*See Opening Brief* at 16; *Green Dec.* ¶ 56. *See also McMullen Dec.* at ¶¶ 2-3. It is precisely this admitted lack of experience that caused trial counsel to fail in so many respects. *See Green Dec.* ¶ 47.

But this lack of experience was only half of the problem. Trial counsel has also recounted the sordid history of his employer, the Barton law firm. *See Green Dec.* ¶¶ 6-12. The State goes so far as to claim, again without citation to any evidence in the record, that the law firm did not “with[hold] assistance to Mr. Green in order to maximize its profits.” *Response* at 16. But Green has explained that the law firm refused to provide him any assistance at all. *See Green Dec.* ¶ 46 (“I feel like the Barton firm is largely responsible for Ryan’s conviction in this case.”). The firm did not allow Green to interview any of the witnesses relating to the history (and family circumstances) of these allegations. *See id.* ¶ 29. Moreover, the firm did not allow Green to consult with an expert witness:

As trial approached, I asked Mr. Barton’s firm to provide funding for an expert witness to review the medical reports or to consult with him regarding the medical evidence in this case. However, Mr. Barton’s firm never agreed to provide funding for an expert witness. I attempted to discuss my concerns regarding the medical evidence with Mr. Shapiro, who purportedly had responsibility for supervising the criminal defense attorneys at Mr. Barton’s firm. Mr. Shapiro did not seem concerned about this issue. Instead, he sent emails of encouragement that told me it sounded like I was “doing great.”

*Id.* ¶ 27. After Green finally interviewed the State’s expert (in the courthouse during trial, just minutes before she testified, and without the assistance of an investigator), Green’s supervisor offered no assistance. Instead, he told Green “not to worry too much.” *Id.* ¶ 42.

In essence, Petitioner was tricked into hiring an unscrupulous law firm and unqualified attorney to defend the case. *See Wilson Dec.* ¶ 9; *Farris Dec.* ¶ 9. Because of its financial interest, the law firm refused to allow trial counsel to investigate the case, to retain an expert witness, or to complete any of the steps necessary to defend the case at trial. Petitioner was clearly prejudiced on account of this conflict.

4. **Trial Counsel’s Performance was Deficient in Numerous Respects**

a. **Deficiencies in Handling of Medical Evidence**

Despite the fact that corroborating evidence is often decisive in a case of this sort,<sup>2</sup> trial counsel failed to appreciate the significance of the State’s medical evidence prior to trial. *See Green Dec.* ¶¶ 48-49 (“I did not anticipate that Dr. Vader’s testimony would be so crucial to the State’s case and so devastating to the defense.”).

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<sup>2</sup> The Washington Supreme Court has explained that “[t]he most effective types of corroboration in [child sex abuse] cases, of course, are eyewitness testimony, a confession or admissions by the accused, and **medical or scientific testimony documenting abuse.**” *State v. Swan*, 114 Wn.2d 613, 622-23 (1990).

Lacking prior experience in a case of this sort, trial counsel's sole "preparation" for the State's expert witness was to conduct "internet research regarding injuries to the hymen." *Green Dec.* ¶ 30. From this web search, trial counsel "hoped" the doctor would admit that hymenal notches could have been caused by activities such as falling off a bicycle or horseback riding. *See id.* This "hope" was unfounded.

Although he had represented Petitioner for approximately ten months prior to trial, counsel failed to arrange an interview of Dr. Vader until just a few minutes before she testified at trial. *See Green Dec.* ¶¶ 29-31.<sup>3</sup> Trial counsel was therefore entirely unprepared to confront the doctor when, during this brief interview, she would not agree with what he had seen on the internet. *See id.*<sup>4</sup> Trial counsel's careless and thoughtless handling of such a critical witness cannot be considered strategic.

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<sup>3</sup> At the close of the first day of trial, the prosecutor noted: "I think we'll be ready to proceed in the morning. Doctor will be ready – should be ready to testify at nine a.m. Defense will need an opportunity to speak briefly with her, so hopefully – I think she's going to try and get here about a quarter till." VRP 74. Court resumed promptly the next morning at 9:09 a.m. and Dr. Vader was the first witness of the day. *See id.*

<sup>4</sup> The State now argues that trial counsel could not have been surprised at Dr. Vader's testimony because it was consistent with her report. *See Response at 31.* However, it was not the substance of her testimony that surprised counsel, but rather the doctor's failure, during the brief interview, to agree with counsel's alternative explanations for the supposed injuries which was the surprising part. *See Green Dec.* ¶ 30.

This corroborative medical evidence was critical to the State's case. Ultimately, the prosecutor relied heavily upon this evidence and advanced the following argument to the jury:

This is not a normal injury for a young female the age of [A.L.]. This injury, according to the doctor, is highly consistent with penetration, vaginal penetration, forced vaginal penetration, okay. So this is consistent with the statements that [A.L.] is giving.

VRP 155.

The State would now like this Court to believe that trial counsel effectively cross-examined Dr. Vader because he was “able to get Dr. Vader to concede the only issue in dispute: whether the notches on A.L.’s hymen were the result of sexual activity.” *Response* at 33. This is a gross mischaracterization of the cross-examination (and the evidence at trial).

Trial counsel candidly admits that he “was ill prepared to cross-examine Dr. Vader because [he] had no way to discredit her or to contradict her opinions and conclusions.” *Green Dec.* ¶ 31. **In fact, counsel was so unprepared that his cross-examination of this expert comprises less than one page of the transcribed record.** See VRP 93. The only arguably substantive question trial counsel posed was, “Can you

say with any medical certainty that that hard object was – or that this was due to sexual activity?”<sup>5</sup> In response, Dr. Vader answered “No.” *Id.*

The State’s contention that this cross-examination somehow dismantled Dr. Vader’s testimony is absurd. The doctor had never claimed that she could say the trauma was certainly caused by sexual activity. Rather, the prosecutor specifically asked the doctor on direct examination whether she could tell what penetrated the vagina, to which she responded “No.” VRP 90.<sup>6</sup> Therefore, trial counsel’s question merely restated what had already been elicited on direct examination; it did nothing to confront any other aspect of this damning evidence.

In a bit of wishful thinking, the State now asserts that “Dr. Vader testified that notches on the hymen could be naturally occurring.” *Response* at 35. The State offers no citation to support this claim; and there is nothing in the record to support it. However, had Petitioner’s counsel properly prepared for trial and retained a medical expert such as Dr. Welch, the defense would have been able to demonstrate this fact to the jury. *See Welch Dec.* ¶ 6 (noting that “the described findings are quite

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<sup>5</sup> It is noteworthy that trial counsel did not even know how to construct a leading question during this examination.

<sup>6</sup> Nevertheless, the prosecutor spent quite a bit of time eliciting from Dr. Vader that this type of injury could not have come from other activities, such as sports, inserting a tampon, or masturbation. *See* VRP 91-92.

consistent with normal anatomical variations and do not support Dr. Vader's ultimate conclusions").

Without the assistance of a defense expert or any experience with gynecological issues prior to trial, trial counsel did not elicit any testimony that could assist Petitioner's defense. Instead, counsel resorted to arguing that A.L.'s injuries could have been caused by masturbation with a "dildo." *See* VRP 161.<sup>7</sup> Without an expert witness (or other supporting evidence), counsel could offer little more than his own unsupported and offensive claims. This ridiculous argument was entirely unsupported by the record, arguably objectionable, and a textbook example of counsel's inexperience and lack of preparation.<sup>8</sup>

Trial counsel's failure is particularly glaring in light of the fact that he could have uncovered powerful evidence to support a defense at trial. As explained by Dr. Philip Welch,

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<sup>7</sup> "Now, the prosecution just argued that masturbation is always done with the clitoris. If that's the case, then why do they sell vibrators and dildos? Ladies and gentlemen, I submit to you that it's not always the clitoris and that maybe a teenage girl might be a little curious about her own sexuality." VRP 160. This is a highly offensive argument in relation to a young child. Moreover, the argument was particularly outrageous given the fact that Dr. Vader had testified that this injury could not have come from masturbation. *See* VRP 91.

<sup>8</sup> "Of course, this was a foolish argument and it could not have helped Ryan['s] case...there was no evidence presented that A.B.L. had ever masturbated with a vibrator or dildo. I would have never made this type of argument if I could have presented evidence to undercut Dr. Vader's findings and conclusions. This was a desperate argument that I made only because I had no evidence that could contradict the doctor's findings." *Green Dec.* ¶ 44.

It is highly unlikely that brief penetration with a penis could produce tearing of the hymen – such that would be visible in two places months or years later. As Dr. Vader notes when asked about self injury, such trauma is extremely painful and would likely have created a great deal of commotion at the time. *See* Appendix C (Vader Testimony at 92). Such an injury would have been difficult to achieve without real threat or force. Also, such trauma would very likely have produced at least some hours or days of bleeding, likely to have been noticed by parents or caregivers at the time.

*Welch Dec.* ¶ 11. With this evidence in hand, trial counsel could have thoroughly and completely neutralized Dr. Vader’s testimony. Moreover, he could have used this evidence to demonstrate that A.L.’s current claims were unbelievable and ***not*** supported by any corroborating evidence.

The State’s claim that “calling a defense expert would have only drawn further attention to the fact that Dr. Vader, in fact, discovered two notches on A.L.’s hymen” (*Response* at 36) ignores the significant role played by the medical evidence at trial. Dr. Vader travelled from Colorado to testify about these supposed hymenal notches. Her direct testimony was lengthy, and involved multiple diagrams of the notches, as well as a demonstration of the Foley catheter used during the examination. *See* VRP 80-83. As discussed above, the medical evidence figured prominently in the prosecutor’s closing argument as the supposed corroborative evidence in what was otherwise a he said/she said case. Dr. Vader was a critical witness for the State and the suggestion that the

defense was better off doing nothing to rebut her testimony – as did Petitioner’s trial counsel – is untenable given the significance of the testimony to the State, and the existence of credible medical testimony, such as that of Dr. Welch, which could have directly contradicted the State’s evidence. The ostrich does not get rid of his enemy by putting his head in the sand.

“A lawyer who fails to adequately investigate, and to introduce into evidence, information that demonstrates his client’s factual innocence, or that raises sufficient doubt as to that question undermines confidence in the verdict, renders deficient performance.” *Lord v. Wood*, 184 F.3d 1083, 1093 (9<sup>th</sup> Cir. 1999) (counsel ineffective by conducting only cursory investigation of potential alibi witnesses and subsequent failure to put them on the stand). Here, as in *Lord*, counsel had no reasonable basis for his action or inaction.

Finally, the State falsely contends that “the defendant cites to no authority to support his proposition that defense counsel is required to call an expert.” *Response at 34*. On the contrary, Petitioner has cited numerous cases in which trial counsel was found ineffective for failing to investigate or respond to critical medical evidence. *See Opening Brief at 35-37* (citing cases). *See also State v. Thomas*, 109 Wn.2d 222 (1987) (counsel ineffective in failing to present testimony from a qualified

expert). *Accord Driscoll v. Delo*, 71 F.3d 701, 709 (8<sup>th</sup> Cir. 1995) (reasonable defense lawyer would take measures to understand the laboratory tests performed and the inferences that one could logically draw therefrom); *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986), *aff'd*, 828 F.2d 670 (11<sup>th</sup> Cir. 1987) (finding ineffectiveness where defense counsel knew that gunshot residue testimony was “critical,” but “[n]evertheless, he neither deposed . . . the State’s expert witness, nor bothered to consult with an expert in the field prior to trial”); *Pavel v. Hollins*, 261 F.3d 210, 223 (2d Cir. 2001) (in a child abuse case, defense counsel’s “performance was deficient to the extent that he did not call a medical expert to testify as to the significance of the physical evidence presented by the prosecution”); *Lindstadt v. Keane*, 239 F.3d 191, 202 (2d Cir. 2001) (“defense counsel’s failure to consult an expert [and] failure to conduct any relevant research . . . contributed significantly to his ineffectiveness”); *Knott v. Mabry*, 671 F.2d 1208, 1212-13 (8<sup>th</sup> Cir. 1982) (counsel ineffective for failing to consult an expert where “there is substantial contradiction in a given area of expertise,” or where counsel is not sufficiently “versed in a technical subject matter . . . to conduct effective cross-examination”); *Spencer v. Donnelly*, 193 F. Supp. 2d 718, 733 (W.D.N.Y. 2002) (“A defense medical expert could have brought light to causes other than penile penetration for Abeline’s scarring or cleft

on her hymen . . . ‘Moreover, there is no evidence that defense counsel contacted an expert, either to testify or (at least) to educate counsel on the vagaries of abuse indication.’”).

Likewise, in this case there could be no legitimate strategy – and the State suggests none – for trial counsel’s failure to prepare himself and then rebut the State’s most-critical evidence.

**b. Trial Counsel Should Never Have Relied on a Legally Erroneous Defense that Depended on the Date of the Offense**

The State claims that the record does not support trial counsel’s claim that he relied on a defense that depended on the State’s error in charging the date of the offense. *See Response* at 18-20. Yet the opposite is true. Just moments following trial counsel’s opening statement, the prosecutor addressed the trial court:

I wanted to address something at this point, although I don’t have a document to support it yet. My understanding is the witness is expressing some confusion of whether it was in 2002 summer or potentially the summer of 2003... **Had we had the information at an earlier date,** we would have filed an Amended Information. The State will be asking to do so, but don’t have one at this time.

VRP 18 (emphasis added).

Trial counsel admits that he did not realize the State could amend the information after trial commenced, and that he had hoped to present an alibi-type defense by proving that A.L. had not been in Washington during

the time-period specified in the original information. *See Green Dec.* ¶¶ 34, 52. Moreover, Petitioner himself corroborates trial counsel’s reliance on this foolhardy “strategy”:

Mr. Green told me that I had a very strong case. In particular, Mr. Green felt that because the charging document was limited to the summer of 2002, and our defense witnesses would testify that A.L. did not visit our house until the summer of 2003, I would very likely prevail at trial . . . . Based on these factors, Mr. Green told me that there was an 80-90% chance that I would be acquitted at trial.

*Ryan Farris Dec.* ¶ 14. Trial counsel never mentioned the date discrepancy during pretrial motions, or in any other exchanges with the trial court. Rather, it is clear that counsel intended to “lie in the weeds” so that he could raise this “defense” once trial commenced.

All of this evidence supports trial counsel’s candid admission that he intended to rely on this discrepancy to argue the State could not prove the charged offense. *See Green Dec.* ¶ 52. Had counsel performed basic legal research, he would have realized that his reliance on this strategy was untenable, and that the trial court would surely permit the State to amend the information as to the date of the alleged offense. “An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all.” *Correll v. Ryan*, 465 F.3d 1006, 1015-16 (9<sup>th</sup> Cir. 2006).

**c. Trial Counsel Failed to Discover Powerful Impeachment Evidence**

In light of the limitations imposed by the Barton law firm, trial counsel “did not conduct any formal investigation regarding A.B.L. or her family.” *Green Dec.* ¶ 22. Had he conducted such an investigation, counsel would have discovered a great deal of evidence that would have undermined the alleged victim’s claims. *See id.* ¶ 53. As noted above, the failure to conduct an adequate pretrial investigation, in itself, constitutes a violation of the Sixth Amendment. That is particularly true in a case involving allegations of sexual misconduct. *See, e.g., Hart v. Gomez*, 174 F.3d 1067, 1070-71 (9<sup>th</sup> Cir. 1999) (counsel ineffective in failing to properly investigate and present evidence regarding discrepancies in alleged victim’s claims of sexual abuse).

Here, the State focuses on one of these items of evidence – A.L.’s affidavit submitted with her mother’s Motion to Modify Parenting Time – and argues that the facts contained within that affidavit would not be admissible in evidence. *See Response at 25.*

This is pure sophistry. During June 2004, just a few months after the alleged incident, A.L. prepared an affidavit for the family court in which she listed inappropriate conduct that had occurred while she was

staying at the Love home. *See Love Dec. App. B.*<sup>9</sup> The affidavit describes misconduct at the Love residence, including the statement that A.L. personally “witnessed sexual activities going on . . .” *Id.* It is reasonable to expect that this would have been the time for A.L. to mention her own assault at the hands of Ryan Farris – if such an incident had actually occurred. A.L. has never claimed that Petitioner told her not to discuss this incident. Nor has A.L. claimed that she somehow repressed the memory of this incident. Nevertheless, this affidavit does not describe this alleged incident or a claim that she was involved in sexual activities.<sup>10</sup>

The State cannot convincingly argue that this evidence would have been inadmissible at Petitioner’s trial. A criminal defendant has a constitutional right to confront the allegations of his accuser. *See, e.g., Davis v. Alaska*, 415 U.S. 45 (1984); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). A.L.’s affidavit supports a very strong argument for “impeachment by omission.” Whenever a person has prepared a written report or summary regarding events and then testifies to important facts that they omitted, the witness is ripe for this type of impeachment. *See, e.g., Varas v. State*, 815 So.2d 637, 640 (Fla. 2001) (“It is well-settled that

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<sup>9</sup> Presumably, this affidavit was prepared by Ms. Marchun’s lawyer, who must have conducted a comprehensive interview of A.L. to obtain this information.

<sup>10</sup> In fact, had trial counsel completed a thorough investigation he would have discovered that as the summer came to a close, A.L. had asked for permission to stay in Vancouver, Washington to live with her father and Petitioner. *See Love Dec.* ¶ 5.

a witness may be impeached by a prior inconsistent statement, including an omission in a previous out-of-court statement about which the witness testifies at trial, if it is of a material, significant fact rather than mere details and would naturally have been mentioned.”); *People v. Bornholdt*, 33 N.Y.2d 75, 88 (1973) (witness may be impeached by omission if prior statement reasonably called for omitted material).

Had counsel conducted a through investigation he would have discovered evidence that would have undermined all of A.L.’s claims. He would have been able to present testimony that there was no evidence that A.L. had been bleeding around the time of alleged incident. Also, he would have discovered evidence that A.L. had a motivation to level this false claim against Petitioner. *See Love Dec.* ¶¶ 12-17. There could be no strategic reason for the failure to present this evidence.

**5. Trial Counsel Committed Numerous Additional Errors**

As noted in Petitioner’s Opening Brief, trial counsel committed numerous other errors. *See Opening Brief* at 44-48. The State argues none of these errors are prejudicial. *See Response* at 29-30. However, the Court must consider the cumulative impact of all of counsel’s failings. *See, e.g., Dugas v. Coplan*, 428 F.3d 317, 335 (1<sup>st</sup> Cir. 2005) (*Strickland* clearly allows the court to consider the cumulative effect of counsel’s

errors in determining whether defendant was prejudiced). *See also Harris By and Through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995).

**6. Petitioner was Prejudiced by these Numerous Deficiencies**

To satisfy the “prejudice” prong, Petitioner must establish that but for his counsel's deficiency, there is a “reasonable probability” that the outcome would have been different. He “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226.

The State does not claim this case involved overwhelming evidence of guilt. Instead, the State seems to argue, generally, that Petitioner was not prejudiced by counsel’s failings because the jury must have accepted A.L.’s testimony. *See Response* at 41.<sup>11</sup> If taken to its logical conclusion, no Petitioner would ever be entitled to relief in a sexual abuse case since you must assume that the fact-finder would not convict if it did not have an abiding belief in the truth of the complainant’s testimony. But, as shown above, numerous courts have granted relief in very similar circumstances. *See generally State v. Horton*, 116 Wn.App. 909 (2003) (counsel’s failure to introduce alleged victim’s prior

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<sup>11</sup> In so doing, the State intentionally chooses not to focus upon the actual evidence presented at trial – for there is no question that this was a relatively weak “he said-she said” case.

inconsistent statements regarding sexual history and failure to object to prosecutor's improper argument constituted deficient performance in sexual assault case).

This case lay on a knife edge, and it would not have taken much to sway at least some jurors towards acquittal. Accordingly, the threshold for prejudice is comparatively low because less would be needed to unsettle a rational jury. *See Strickland*, 466 U.S. at 696 (“[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.”). Petitioner has identified several, substantial constitutional errors that occurred at trial. Each error, when viewed separately, is so serious as to compel reversal of his conviction. Even more clearly, the cumulative effect of the errors establishes that Petitioner suffered actual prejudice at the trial. Counsel's deficient performance deprived Petitioner of a fair trial. In light of all the evidence presented, the prejudicial effect of counsel's errors is overwhelming, and the trial court's verdict must be reversed.

7. **If Necessary, this Court Should Grant a Reference Hearing**

In Washington, a PRP is required to contain a description of the evidence upon which the petitioner's claim of unlawful restraint is premised and the evidence proffered to support those allegations. RAP


16.7(a). An evidentiary hearing will be ordered if the pleadings raise a *prima facie* claim of constitutional error which cannot be resolved on the existing record. See RAP 16.11(b); *In re PRP of Williams*, 111 Wn.2d 353, 365 (1988).


The Washington Supreme Court has compared review of the factual support for a PRP to ruling on a motion for summary judgment. See *State v. Harris*, 114 Wn.2d 419, 435-36 (1990) (comparing PRP review to that of civil summary judgment and claims of incompetency to be executed). In other words, the appellate court is required to order a reference hearing if competent evidence is submitted which raises a triable issue. In determining whether the petitioner has set forth a *prima facie* case, the court must treat the allegations as true. See, e.g., *Lewis v. Bours*, 119 Wn.2d 667, 670 (1992). Here, at bare minimum, this Court must remand the case for a reference hearing under RAP 16.12.

C. **CONCLUSION**

For all of these reasons, and in the interests of justice, Petitioner's conviction must be vacated and reversed. If necessary, this case should be remanded pursuant to the clear dictates of RAP 16.12.


RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of January, 2013.

  
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Todd Maybrown, WSBA #18557

  
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Cooper Offenbecher, WSBA #40690

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### PROOF OF SERVICE

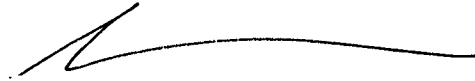
Todd Maybrown swears the following is true under penalty of  
perjury under the laws of the State of Washington:

On the 14<sup>th</sup> day of January 2013, I sent by U.S. Mail, postage  
prepaid, one true copy of Reply Brief in Support of Personal Restraint  
Petition directed to attorney for Respondent:

Abigail E. Bartlett  
Deputy Prosecuting Attorney  
Clark County Prosecutor's Office  
P.O. Box 5000  
Vancouver, WA 98666-5000

One true copy of Reply Brief in Support of Personal Restraint Petition was  
delivered to Petitioner.

DATED at Seattle, Washington this 14<sup>th</sup> day of January, 2013.



Todd Maybrown, WSBA #18557  
Attorney for Petitioner